QUESTION PRESENTED

Whether the warrants authorizing the inspections of petitioners' business premises pursuant to the Occupational Safety and Health Act of 1970 were overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2193

HERN IRON WORKS, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ETC.

LEWIS YOUNGSTROM, ETC., PETITIONER

v.

U.S. DEPARTMENT OF LABOR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Hern Iron Works, Inc.* v. *Donovan* (Pet. App. B-1 to B-8) is reported at 670 F. 2d 838. The oral opinions of the district courts in both cases are unreported.

JURISDICTION

The judgment of the court of appeals in *Hern* was entered on March 1, 1982. The notice of appeal in *Youngstrom* was docketed on June 26, 1981. The petition for a writ of certiorari was filed on May 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hern Iron Works, Inc., operates a foundry in Coeur d'Alene, Idaho, where it produces molded iron castings (Pet. App. E-2). On March 23, 1979, a Hern employee representative filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging the existence of two serious hazards at the foundry: (1) employees were required to pour molten metal without instruction and without protective equipment or clothing, and (2) there was no ventilation system in the foundry area (*id.* at G-2). Based on that information, and pursuant to Sections 8(a) and 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a) and 657(f)(1),[1] and to

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[1]Section 8(a), 29 U.S.C. 657(a), authorizes the Secretary of Labor "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area * * * where work is performed by an employee of an employer, and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *."

Section 8(f)(1), 29 U.S.C. 657(f)(1), provides that where an employee or employee representative believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," he may "request an inspection" by presenting a signed, written notice to the Secretary "set[ting] forth with reasonable particularity the grounds for the notice * * *." If the Secretary then "determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative * * * in writing of such determination."

the pertinent OSHA regulation and program directive,[2] the Secretary applied to the United States District Court for the District of Idaho for a warrant to inspect Hern's premises (Pet. App. E-1 to E-4). The application, which was supported by an affidavit and a copy of the complaint, requested authority to conduct a full-scope inspection of the workplace (*id.* at E-3).

On June 16, 1980, the district court issued the requested warrant (Pet. App. H-1 to H-2),[3] which entitled OSHA inspectors to enter Hern's workplace

> during regular working hours or at other reasonable times, and to inspect, to take environmental samples and photographs related to the purpose of the inspection, and to investigate in a reasonable manner and to a

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[2]The Secretary's regulation, 29 C.F.R. 1903.11(b), states that occupational safety and health inspections in response to formal employee complaints "shall not be limited to matters referred to in the complaint."

OSHA Instruction CPL 2.12A, [1978-1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,743, which went into effect September 1, 1979, provided that complaint inspections in high-hazard industries should generally extend to the entire facility, but should be limited to the scope of the complaint in low-hazard industries. CPL 2.12A was pertinently incorporated into OSHA Instruction CPL 2.45, OSHA's Interim Field Operations Manual, on September 15, 1980, and replaced by OSHA Instruction CPL 2.12B, 3 Empl. Safety & Health Guide (CCH) para. 12,451, on February 1, 1982. The latter directive, which is currently in effect, further limits the circumstances under which full-scope complaint inspections will be conducted. This new directive generally limits inspections to complaint matters unless the establishment itself has a higher-than-average lost workday injury rate and is a member of a high-rate industry.

[3]OSHA had previously obtained two other warrants to inspect Hern, but had been unable to execute them. In early June 1979, the district court refused to enforce its April 18, 1979, warrant over the company's objection that the warrant had been improperly issued to John Hern rather than to the company (Pet. App. B-3). On June 9, 1980, after much delay, the district court refused to enforce its June 22, 1979, warrant, this time holding that service of the warrant had been improper (*ibid.*).

> reasonable extent, the aforesaid worksite and business where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.[4]

Hern refused to honor the warrant, and the Secretary petitioned the district court to hold the company in civil contempt. At a hearing on the matter, the court rejected Hern's various objections to the warrant, including its contention that the scope should be limited to items mentioned in the employee complaint (Pet. App. B-3). It found the company in contempt and fined it $1000 for its "deliberate" disobedience (*id.* at C-1).

The court of appeals affirmed (Pet. App. B-1 to B-8). It found "no lack of reasonableness" in the issuance of a full-scope warrant in this case (*id.* at B-6) and concluded that broad inspections in response to employee complaints

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[4]After the Hern warrant was issued, OSHA's rules of practice and procedure concerning agency access to employee medical records went into effect. See 29 C.F.R. 1913.10. Under those rules, each request for personally identifiable employee medical information must generally be made pursuant to a written access order approved by the Assistant Secretary of Labor for Occupational Safety and Health upon recommendation of the OSHA Medical Records Officer. 29 C.F.R. 1913.10(d)(1). Accordingly, when conducting his investigations in these cases, the Secretary will not inspect any such information without first following the prescribed procedures.

are generally proper (*id.* at B-7 to B-8). The court first noted that the warrant application had been " 'in response to an employee safety and health complaint submitted pursuant to Section 8(f)(1) of the Act *and as a part of an inspection program designed to assure compliance with the Act*' " (*id.* at B-6; emphasis added by the court of appeals; footnote omitted). In the court's view, the agency's guidelines on employee complaints "protect commercial property owners from 'unbridled discretion [of] executive and administrative officers [,]' *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 * * * (1978), by assuring that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' *Camara* v. *Municipal Court*, 387 U.S. 523, 538 * * * (1967)" (Pet. App. B-7 n.4). Second, the court ruled that "[t]he magistrate could reasonably have inferred that inspection of the entire Hern establishment was necessary to detect ventilation hazards" (*id.* at B-7). It pointed out that there was no information before the judge indicating that the Hern facility was either a multi-faceted establishment or too large for a full-scale inspection to be reasonable (*ibid.*).[5]

2. Petitioner Youngstrom manufactures log beams and other building components used in log homes at a facility in Blackfoot, Idaho (Pet. App. I-1 to I-2). On October 21, 1980, a Youngstrom employee seriously injured his foot when he caught it in the unguarded chain sprocket of a debarker machine (*id.* at J-2). The employee, who was subsequently hospitalized, telephoned OSHA and reported the accident to an agency compliance officer (*id.* at J-1 to J-2). When the compliance officer interviewed the injured

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[5]The court also held that the probable cause supporting the warrant was not stale (Pet. App. B-4 to B-5) and that the scope of the document inspection authorized by the warrant was proper (*id.* at B-7).

employee at the hospital, the employee filed a formal complaint concerning eight hazards at the Youngstrom workplace (*id.* at K-1 to K-3).[6] On November 3, 1980, in response to the complaint and in accordance with the Act and relevant administrative standards,[7] an OSHA compliance officer attempted to inspect Youngstrom, but the company refused to permit investigation of anything other than the particular machine involved in the accident (*id.* at J-2 to J-3).

Thereafter, on December 1, 1980, the United States District Court for the District of Idaho granted the Secretary's application for a warrant authorizing a full-scope inspection of the Youngstrom facility (Pet. App. L-1 to L-2).[8] However, on December 8, 1980, the company refused to permit the compliance officer to execute the warrant (*id.* at D-1). At the subsequent contempt hearing, the district court rejected Youngstrom's argument that the warrant's scope was overbroad, found the company in contempt, and imposed a $500 fine (*id.* at D-1 to D-2). Youngstrom filed a notice of appeal from the district court's judgment. That appeal is still pending.

ARGUMENT

Petitioners urge the Court to grant review in these cases in order to determine whether an OSHA warrant based on an employee complaint must restrict the inspection to those

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[6]The employee complaint alleged that hearing protection was inadequate; that no one was trained in first aid; that the log peeler chain and sprockets, the trim saws, and the fan on the 10-inch lathe were unguarded; that guarding on most equipment was not adequate; that the grinders' electrical cords were unsafe; and that the process of applying creosote to log ends was hazardous (Pet. App. K-2).

[7]See notes 1 and 2, *supra*.

[8]The scope of inspection provided for in the Youngstrom warrant was identical to the Hern warrant's scope (Pet. App. L-1 to L-2).

areas of the worksite mentioned in the employee complaint. This question raises two separate but related issues: (1) whether the Occupational Safety and Health Act authorizes the inspection of worksite areas outside the scope of an employee complaint, and (2) if so, whether such inspections are reasonable under the Fourth Amendment. We note that the Court recently declined to review an identical contention on very similar facts in *J.R. Simplot Co.* v. *OSHA*, cert. denied, No. 81-863 (Feb. 22, 1982), and there is no greater reason to review that contention here.[9]

1. To begin with, the scope of the inspection for which authorization was sought in these cases was determined by an administrative program directive that is no longer in effect. See note 2, *supra*. That directive, OSHA Instruction CPL 2.12A, required OSHA inspectors to conduct full-scope inspections in response to complaints about working conditions in establishments in high-hazard industries, whether or not the facilities themselves were high-hazard. Under the revised guidelines set forth in CPL 2.12B, which were issued after the warrants involved in these cases had been obtained, full-scope inspections are reserved for complaints about high-hazard establishments in high-hazard industries. Because the Secretary's new directive eliminates

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[9]Petitioner Youngstrom seeks a writ of certiorari before judgment, which "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974). While Youngstrom asserts (Pet. 15-16) that the question presented here is important to the public, it offers no justification for deviating from "normal appellate practice" to resolve that question in the context of its particular case. Nor could it, since the *Hern* case, in which the court of appeals has rendered judgment, raises the identical issues. Certiorari before judgment in *Youngstrom* is therefore inappropriate.

a great many full-scope complaint inspections, the Court should refrain from deciding the scope issue in the context of these cases, which arise under a now defunct administrative program.[10] Cf. *Cook* v. *Hudson*, 429 U.S. 165 (1976); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

2. Review is particularly inappropriate here because the scope of these warrants would be upheld even by those courts of appeals that do not agree with the Ninth Circuit that full-scope complaint inspections are proper as a matter of law.[11] As a factual matter, the hazardous conditions

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[10]It is impossible to state with certainty whether petitioners' establishments are subject to a full-scope inspection under the new program directive because the Secretary's representatives have not been permitted to review petitioners' employee-injury records. Although both petitioners are in high-hazard industries, until petitioners' records are actually examined it cannot be determined whether petitioners have a higher-than-average lost workday injury rate. If petitioners' injury rates are not above average, then under the Secretary's new directive petitioners would not be subjected to full-scope inspections following employee complaints in the future.

[11]Four other courts of appeals have considered the scope of inspection issue. In an unpublished opinion, the Fourth Circuit affirmed a district court decision holding that full-scope warrants founded on employee complaints are constitutionally permissible. *Marshall* v. *Seaward International, Inc.*, 644 F. 2d 880 (1981), aff'g 510 F. Supp. 314 (W.D. Va. 1980). The Seventh Circuit, in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313 (1980), upheld a full-scope warrant based on an employee complaint; however, because each of the three judges on the panel wrote a separate opinion, there was no opinion for the court on the question presented here. The Seventh Circuit had previously upheld a full-scope warrant over objection that the inspection should be limited in scope to the substance of the complaint. *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F. 2d 1335, cert. denied, 444 U.S. 884 (1979), aff'g 1977-1978 Occup. Safety & Health Dec. (CCH) para. 22,270 (N.D. Ill. 1977). See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra*, 625 F. 2d at 1323-1325.

On the other hand, the Third Circuit, in *Marshall* v. *North American Car Co.*, 626 F. 2d 320 (1980), held, solely as a matter of statutory construction, that the scope of OSHA inspections conducted under

reported in each of the complaints were "sufficiently diffuse to sustain the magistrate's determination that a search of the entire workplace was reasonable." *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313, 1326 (7th Cir. 1980) (Fairchild, C.J., concurring). Since one of the violations alleged to exist in the Hern foundry was "[n]o ventilations [*sic*] system in the foundry area" (Pet. App. G-2), it was, as the court of appeals concluded (*id.* at B-7), reasonable to infer that inspection of the entire facility was necessary. Similarly, the complaint about the Youngstrom workplace described at least two hazards—inadequate hearing protection and inadequate guarding of most equipment (*id.* at K-2)—that could not be associated with a limited area of the facility. In these circumstances, the scope of the inspections authorized by the warrants bore a reasonable relationship to the nature of the hazards alleged (see *Marshall* v. *North American Car Co.*, 626 F. 2d 320, 324 (3d Cir. 1980)), and thus was proper under any of the tests set forth by the courts of appeals that have considered the scope of inspection issue.

3. Although review is not warranted in these cases, we submit that full-scope inspections based on employee complaints are consistent with both the Fourth Amendment and the Occupational Safety and Health Act. Because such inspections are governed by reasonable administrative standards and must be approved by a neutral magistrate, there is no danger that the decision whether to conduct a full-scope search will be left to the unbridled discretion of the officers in the field. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Moreover, if full-scope inspections

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29 U.S.C. 657(f) pursuant to an employee complaint must bear an appropriate relationship to the violations alleged in the complaint. And, in dictum, the Eighth Circuit has commented that the Fourth Amendment requires limited-scope inspections. *Marshall* v. *Central Mine Equipment Co.*, 608 F. 2d 719, 720-721 n.1 (1979).

are proper when conducted pursuant to general administrative plans—where there is no specific basis for suspecting that the conditions at a particular facility are in violation of the Act—then it is reasonable to conclude that full-scope inspections should also be permissible where there is probable cause to believe that a violation exists at a particular establishment. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F. 2d at 1323-1326 (opinion of Sprecher, J.). That is especially so since under OSHA's current program directive, the establishment itself must have a higher-than-average injury rate and must be a member of a high-hazard industry. Finally, Section 8(f)(1) of the Act is a description of the circumstances under which the Secretary *must* conduct an inspection. Thus, the section is essentially an employee rights provision (see *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 16 & n.25 (1980)), not a limitation on the Secretary's authority to inspect. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F. 2d at 1326 (opinion of Sprecher, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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